FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-753

GREAT AMERICAN FEDERAL SAVINGS & LOAN ASSOCIATION, JOHN A. VIROSTEK, JOSEPH E. BUGEL, JOHN J. DRAVECKY, DANIEL T. KUBASAK, EDWARD J. LESKO, JAMES E. ORRIS, JOSEPH A. PROKOPOVITSH, JOHN G. MICENKO, and FRANK J. VANEK,

Petitioners,

v.

JOHN R. NOVOTNY,

Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondent's position in this appeal is based upon the following four fundamental misconceptions concerning the arguments set forth in the Brief for Petitioners:

1. That corporate officers and directors are shielded from individual liability because they cannot form a civil conspiracy while working on behalf of their corporation;
2. That the elements of a "conspiracy" vary with the nature of the substantive offenses allegedly committed by the conspirators;
3. That 42 U.S.C. §1985(3) confers substantive rights which predate the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e; and
4. That this Court's requirement that a "congressional source of power" be identified under 42

U.S.C. §1985(3) is limited to identification of the constitutional source of the substantive right being remedied under the statute.

I. The Fact That Officers And Directors Working On Behalf Of Their Corporation Cannot Form A Civil Conspiracy Does Not Immunize Them From Individual Liability.

Respondent (hereinafter referred to as "Novotny") attempts to refute the applicability of the principle that officers and directors working on behalf of their corporation cannot form a civil conspiracy because the principle would shield the officers and directors from individual liability. This is simply not correct.

As noted by Novotny on page 20 of his brief, officers and directors are individually liable for their torts. Furthermore, through the "remedy expanding" principle of *respondeat superior,* the corporation is liable, and a person harmed by a tortious act can seek his remedy from *both* the individuals and the corporation.

As discussed in the Brief for Petitioners, however, the operation of *respondeat superior* in the corporate context negates the need for the application of another remedy expanding principle—civil conspiracy.[1]

In the instant case, for example, Novotny could have sued the individual officers and directors who participated in the decision to terminate him as joint tortfeasors under a tort theory such as wrongful dicharge or

1. In addition, unlike *respondeat superior,* which stems from the understanding that a corporation acts collectively through its agents, the corporate conspiracy rule which Novotny wants this Court to adopt ignores how a corporation operates by treating corporate agents as individuals.

tortious interference with contractual relations. Since the officers and directors were allegedly working on behalf of the corporation at all relevant times, liability could be imputed to the corporation under the theory of *respondeat superior.* The full panoply of defendants was therefore available to Novotny.

Novotny elected, however, to sue the Association and its officers and directors upon the statutory bases of Title VII and Section 1985(3) rather than upon a common law tort basis. The Title VII claim alleges that the termination of Novotny was accomplished in violation of Title VII by "the individual defendants, on behalf of GAF" (App. A at 6. ¶29).[2]

The issue, therefore, is not whether Novotny may sue *both* the individual officers and directors and the Association for the alleged discrimination. He has expressly sued both in the Complaint. The issue is whether, in addition to proceeding under Title VII, Novotny may utilize 42 U.S.C. §1985(3) to impose further liability on the individual officers and directors and the Association.

Imposition of additional liability under Section 1985(3), however, is unnecessary and inequitable. It is unnecessary because the remedy expanding purpose of civil conspiracy liability is already available through *respondeat superior*[3] and, in an employment discrimination case, Title VII. It is inequitable because a corpora-

2. As noted in the Brief for Petitioners at 20 n.14, a Title VII charge can be filed against an employer "and any agents." 42 U.S.C. §2000e(b). Although Novotny named the individual officers and directors as defendants to the Title VII count in the Complaint, he did not name them as Respondents to the EEOC charge.

3. Cases involving allegations of a conspiracy among agents of a municipal corporation are not analo-

tion can only act through its agents, and any corporate decision of note would automatically involve the participation of a number of agents who are allegedly co-conspirators. In addition, fear of further potential liability could "chill" corporate agents from making their day-to-day collective decisions.[4]

Every court of appeals which has held that officers and directors acting on behalf of their corporation cannot form a conspiracy under Section 1985(3) was therefore correct from both a legal and equitable standpoint.[5]

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gous to the application of conspiracy principles to private corporations. Until recently municipal corporations were not considered "persons" under the Enforcement Act of 1871. *Monroe v. Pape,* 365 U.S. 167 (1961). Unless the individual agents were liable, therefore, no recovery would be possible. Moreover, this Court has rejected application of traditional concepts of vicarious liability to municipal corporations. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978).

4. The Third Circuit's assertion (Pet App. A at 53a n. 121) that its broad interpretation of a conspiracy in a civil rights context would have little "impact" because corporate employment decisions do not have the potential liability that decisions with antitrust implications have is totally unfounded. The number of Title VII employment discrimination cases filed in the one-year period ending on June 30, 1977 was 5,931 in comparison to 1,689 antitrust cases. 1977 Annual Report of the Director of the Administrative Office of the United States Courts 100, 112. This disparity would be even greater if the administrative and conciliatory functions of Title VII can be negated by the assertion of Title VII rights under Section 1985(3) as advocated by Novotny.

5. Novotny cites several cases, primarily from federal district courts in Pennsylvania, which have attempted to create an exception to the application of conspiracy principles under Section 1985(3). *E.g., Rackin v. University of Pennsylvania,* 386 F. Supp. 992 (E.D. Pa. 1974); *Jackson v. University of Pittsburgh,* 405 F. Supp. 607 (W.D. Pa. 1975); *Dupree v. Hertz Corp.,* 419 F. Supp. 764 (E.D. Pa. 1976); *Beamon v. W. B. Saunders Co.,* 413 F. Supp. 1167 (E.D. Pa. 1976). These cases place undue stress on Mr. Justice Stevens' language in *Dombrowski v. Dowling,* 459 F.2d 190, 196 (7th Cir. 1972), that "a single act of discrimination by a single business entity" cannot constitute a conspiracy for purposes of Section 1985(3). The *Rackin* line of cases reasons that if more than a single act of discrimination is committed, a conspiracy exists. A conspiracy, however, requires two or more persons, not two or more acts in furtherance of the conspiracy. Nothing in Section 1985(3) suggests otherwise. The reasoning of *Rackin* is, therefore, unsound, as recognized in the Brief for Respondent at 31, and should not be considered an exception to the well-founded rule that officers and directors acting on behalf of their corporation cannot form a conspiracy.

II. The Elements Of A Conspiracy Do Not Change With The Substantive Offense Allegedly Committed By The Conspirators.

The primary element of a conspiracy is that it involves two or more "persons." It is a long-established concept of corporate law that a corporation and its agents working on behalf of the corporation are one "person" in the eyes of the law. It is therefore not surprising that when this conspiracy requirement and corporate principle are combined, courts conclude that a conspiracy cannot be formed by a corporation and its agents working on its behalf. *See, e.g., Nelson Radio & Supply Co. v. Motorola, Inc.,* 200 F.2d 911 (5th Cir. 1952), *cert. denied,* 345 U.S. 925 (1953).

Because the first case to apply this reasoning to 42 U.S.C. §1985(3), *Dombrowski v. Dowling,* 459 F.2d 190 (7th Cir. 1972), relied on *Nelson Radio,* an antitrust case, Novotny asserts that the differences in substan-

tive offenses call for different interpretations of the elements of a conspiracy. In other words, there are "antitrust principles of conspiracy" as opposed to "civil rights principles of conspiracy." (Brief for Respondent at 33).

Novotny creates this unfounded dichotomy because the "business entity" harm sought to be prevented by the antitrust laws is "irrelevant to 42 U.S.C. §1985(3), which speaks in terms of 'persons'" (Brief for Respondent at 29). The premise of Novotny's argument, however, is incorrect on several grounds.

First, the Sherman and Clayton Acts do not speak in terms of "business entities," but are addressed to "persons." Section 1 of the Sherman Act, 15 U.S.C. §1 (1976), clearly states that "[e]very *person* who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . ." (emphasis added).

It cannot be disputed that a corporation is a "person" for purposes of the Sherman Act. 15 U.S.C. §8 (1976). Nor can it be seriously disputed that a corporation is a "person" for purposes of Section 1985(3). *E.g., Dombrowski, supra; Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir. 1976), *cert. denied*, 425 U.S. 974 (1976). *Cf. Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) (a municipal corporation is a "person" for purposes of 42 U.S.C. §1983).[6]

6. In light of these cases, Novotny's assertion that there is "nothing in the statute or the legislative history [of Section 1985(3)] to lead to the conclusion that corporations were 'persons' to be either protected or punished" (Brief for Respondent at 17) is quite puzzling.

Second, since the antitrust laws focus on "persons" rather than "business entities," it is possible for an individual and a *single* business entity to form a conspiracy in violation of the law. *E.g., Johnston v. Baker*, 445 F.2d 424 (3d Cir. 1971) (corporation and officer working for personal gain could form conspiracy). There is, therefore, nothing inherent in the antitrust laws which requires illegal activity by a multiplicity of "business entities."

That Congress directed the antitrust laws against an economic harm more likely to be created by a combination of business entities is irrelevant. That the harm sought to be remedied by the passage of Title VII can be created by a single employer is likewise irrelevant. The question for this Court is whether a single corporate employer can have its potential Title VII liability compounded by a cause of action under Section 1985(3) simply because the corporation necessarily functions through the acts of a number of agents.

Finally, the principle that the agents of a corporation, working on behalf of that corporation, cannot form a conspiracy is not an exclusive antitrust concept. Petitioners have cited numerous examples of the application of this principle in contexts other than antitrust (Brief for Petitioners at 15). *E.g., Dorsey v. Chesapeake and Ohio Railway Co.*, 476 F.2d 243 (4th Cir. 1973) *(per curiam); Worley v. Columbia Gas*, 491 F.2d 256 (6th Cir. 1973), *cert. denied*, 417 U.S. 970 (1974).

There is no support in law or reason for Novotny's assertion that the elements of a conspiracy change depending upon the substantive offense and that a rule applied to an antitrust conspiracy should not be applied in a civil rights context.

III. Section 1985(3) Does Not Provide Any Substantive Right Which Predates The Passage Of Title VII.

Novotny contends that Title VII rights are enforceable under 42 U.S.C. §1985(3) because Title VII was not intended to be the exclusive federal remedy for employment discrimination (Brief for Respondent at 39).

The fallacy of Novotny's contention rests on his failure to analyze the differences between 42 U.S.C. §§1981 and 1985(3). Section 1981 creates *substantive* rights which predate the passage of Title VII. Since Congress did not intend to supplant such rights with Title VII, this Court has held that Title VII is not the exclusive federal remedy for employment discrimination which falls within the scope of both statutes. *Johnson v. Railway Express Agency,* 421 U.S. 454 (1975).

Section 1985(3), in contrast, is purely a *remedial* statute. It must look elsewhere for the right to be enforced, and the *only* source for the right invoked in this case—the right to be free from sex discrimination in private employment—is Title VII itself.

When Congress created Title VII rights, however, it also created an exclusive administrative/judicial framework which must be utilized to enforce those rights.[7] *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). Since Novotny is not being deprived of any pre-existing right, this situation falls within the ambit of *Brown v. General Services Administration,* 425 U.S. 820 (1976), and not *Johnson v. Railway Express, supra.*[8]

Novotny's assertion that Congress intended to create exclusive jurisdiction for rights conferred by Section 717 of Title VII,[9] as well as the Labor-Management Relations Act,[10] the Employee Retirement Income Security Act,[11] and the Age Discrimination in Employment Act,[12] but not for the Title VII sex discrimination and retaliation rights is unsupported (Brief for Respondent at 45-46).

Section 1985(3), therefore, cannot and should not be used to bypass and subvert the Title VII enforcement scheme so carefully created by Congress. *Doski v. M. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976).[13]

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7. Novotny, at 37 and 41 of his brief, relies upon two criminal cases, *United States v. Waddell,* 112 U.S. 76 (1884), and *United States v. Johnson,* 390 U.S. 563 (1968). Both cases, however, deal with rights *not otherwise assertible* criminally without 18 U.S.C. §241. In contrast Title VII rights can and must be asserted under Title VII only. To permit Novotny to proceed under 1985(3) with a Title VII-based right not only would wreak havoc with the exclusivity inherent in Title VII, but would not fulfill the congressional/remedial purpose of 1985(3)——to create a forum to vindicate civil rights *not otherwise assertible.*

8. In their *amici* brief the United States and Equal Employment Opportunity Commission ("EEOC") concede that Congress may create an exclusive enforcement mechanism for "new rights." (U.S. Brief at 26). The creation of Title VII rights was such an instance. Novotny is in the anomalous position of arguing that the creation of Title VII rights constructively supplanted the Title VII enforcement mechanism because such rights can be enforced under Section 1985(3).

9. 42 U.S.C. §2000e-16 (1976).

10. 29 U.S.C. §158 (1976).

11. 29 U.S.C. §1001 (1976).

12. 29 U.S.C. §621 (1976).

13. The United States and EEOC *amici* brief at 27-28 also contends that there are no "practical" prob-

IV. Section 1985(3) Is Not A Remedy For All Wrongs Which Are Within The Constitutional Power of Congress To Regulate.

In *Griffin v. Breckenridge,* 403 U.S. 88, 104 (1971), this Court required that a "source of congressional power to reach the private conspiracy alleged by the complaint" must be identified in each case. Novotny contends that this analysis is satisfied if a constitutional source of power is identified for the right allegedly violated by the conspiracy.

According to Novotny, the analysis in this case is, therefore, quite simple. A Title VII right was allegedly violated. Congress had the power to confer such rights under the commerce clause. This right can, therefore, be enforced under Section 1985(3) in light of congressional power under the commerce clause.

As discussed in detail in the Brief for Petitioners at 41-43, however, there are limitations on the congres-

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lems in allowing enforcement of Title VII rights under Section 1985(3) despite the fact that plaintiffs can avoid the administrative Title VII procedure. This surprising conclusion is based on the assertion that the burden of proof under Section 1985(3) is more rigorous because a plaintiff must prove the existence of a conspiracy, a class-based animus, and intent to deprive a Title VII right.

On the contrary, virtually every corporate employment decision will involve participation of at least two agents, thereby creating a "conspiracy;" violations of Title VII are inherently class-based; and "intent to deprive" someone of a Title VII right is not an element of a Section 1985(3) cause of action. *Griffin v. Breckenridge,* 403 U.S. 88, 102 n.10 (1971). Furthermore, since this Court mooted the appeal in *County of Los Angeles v. Davis,* 47 U.S.L.W. 4317 (March 27, 1979), the less rigorous "disparate impact" theory developed in *Griggs v. Duke Power Company,* 401 U.S. 424 (1971), may be applicable to suits under Section 1985(3).

sional power to legislate pursuant to the commerce clause. The activity must affect interstate commerce. This limitation is embodied in Title VII's requirement that only employers with fifteen or more employees may be regulated. 42 U.S.C. §2000e(b). There is no such commerce clause limitation on the remedy provided by Section 1985(3). Congress, therefore, never intended the Commerce clause to be a source of power to reach a 1985(3) conspiracy.

The analysis mandated by this Court in *Griffin* looks to a source of congressional power to remedy the right violated *under Section 1985(3).* That the right can be constitutionally remedied under a different statutory scheme such as Title VII is irrelevant.

In *Griffin,* this Court looked to the constitutional basis for Section 1985(3) itself—the thirteenth and fourteenth amendments. Those amendments, however, do not reach the right allegedly violated in this case.[14] Novotny has, therefore, failed to identify a source of congressional power to reach the conspiracy in this case.

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14. Novotny attempts to bring the facts of this case within the thirteenth amendment's prohibition against involuntary servitude. As noted in *Flood v. Kuhn,* 316 F. Supp. 271 (S.D.N.Y., 1970), *aff'd,* 407 U.S. 258 (1972), however, if you have the right to quit your employment, you are not in a state of involuntary servitude. The female employees of the Association certainly had that option.

CONCLUSION

For the reasons stated in this Reply Brief, as well as those stated in the Brief for Petitioners, Petitioners respectfully request that the opinion and order entered by the United States Court of Appeals for the Third Circuit in this matter be reversed.

Respectfully submitted,

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